

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2006 Session

STATE OF TENNESSEE v. THOMAS REGINALD SALLEE

**Direct Appeal from the Circuit Court for Montgomery County
Nos. 40400730 and 40400731 Michael R. Jones, Judge**

No. M2005-02887-CCA-R3-CD - Filed January 26, 2007

Defendant, Thomas Reginald Sallee, appeals the trial court's denial of his request for judicial diversion. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Peter J. Strainse, Nashville, Tennessee, for the appellant Thomas Reginald Sallee.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Tommy Thompson, District Attorney General; and David Durham, Assistant District Attorney General, Lebanon, Tennessee, for the appellee, State of Tennessee.

OPINION

I. Background

In case no. 40400730, Defendant was indicted on one count of conspiracy to possess 300 grams or more of cocaine, a Schedule II controlled substance, and two counts of conspiracy to possess 0.5 grams or more of cocaine. Pursuant to a negotiated plea agreement, Defendant entered a plea of guilty to the lesser offense of conspiracy to sell or deliver less than 0.5 grams of cocaine, a Class C felony, in count one, and pled guilty as charged in count two. The State agreed to enter a nolle prosequi as to count three.

Defendant was indicted in case no. 40400731 on one count of aggravated sexual battery of a victim less than thirteen years of age, a Class B felony. Defendant entered a plea of guilty to the lesser offense of simple assault, a Class B misdemeanor, pursuant to the same negotiated plea agreement.

As part of the negotiated plea agreement, Defendant requested judicial diversion, and the trial court deferred acceptance of Defendant's pleas of guilty until determination of Defendant's request at a separate sentencing hearing.

Following a hearing, the trial court denied Defendant's request. The trial court sentenced Defendant as a Range I, standard offender, to concurrent sentences of six years for each felony conviction, and six months for the misdemeanor conviction, all of which was suspended, and Defendant placed on probation for six years.

II. Hearing

Connie Turner, a probation officer with the Board of Probation and Parole, testified that she prepared Defendant's presentence report. Ms. Turner said that Defendant told her during the interview that he graduated from Knoxville College, and that he had been self-employed as a bail bondsman for over twenty years. Ms. Turner said that Defendant stated, however, that he had transferred title to the business and other personal assets to his wife after the incident. Defendant reported that he was not employed at the time of the interview. Ms. Turner said that Defendant does not have a prior criminal record other than the current charges.

According to the presentence report, Defendant has been married for thirty-one years and has two adult sons, both of whom were college graduates. In his written statement concerning the offenses, Defendant denied that he had ever sold drugs or that he had inappropriately touched Monica Davila's daughter, the victim of the assault conviction. Defendant stated that he entered pleas of guilty because it was in his best interest to do so.

Monica Davila testified that she had known Defendant for approximately ten years, and that she and Defendant had been involved in a sexual relationship since that time. Ms. Davila and Defendant have one son who was four years old at the time of the hearing. Defendant made court-ordered child support payments until June 1, 2005. Ms. Davila said that she also has a daughter by her first husband. Ms. Davila said that the events leading up to the assault charge occurred when the victim was eleven years old, and after Defendant had picked the victim up from ballet lessons. Ms. Davila said that she and Defendant were on "good terms" at the time of the incident. Ms. Davila said that her daughter suffered from nightmares and exhibited other emotional effects after the incident.

Ms. Davila said that Defendant introduced her to cocaine during the course of their relationship. Ms. Davila said that Defendant supplied her with cocaine and marijuana from approximately 1999 until 2003, on a weekly, and sometimes bi-weekly, basis. Ms. Davila acknowledged that Defendant had secured an order of protection against her immediately after the guilty plea submission hearing. Ms. Davila said that Defendant subsequently charged her with violating the order of protection based on an encounter following the guilty plea submission hearing.

On cross-examination, Ms. Davila denied that she had been less than truthful during a hearing in which she sought a child support increase for her son. Ms. Davila acknowledged that her

son and daughter were living in Japan with her father at the time of the sentencing hearing. Ms. Davila denied that her first husband was engaged in selling drugs at the time he was killed during a home invasion.

Reginald Flagg testified that he was previously a sergeant with the Tennessee Highway Patrol. Mr. Flagg said that he resigned after pleading guilty to one count of official misconduct and one count of simple possession of cocaine. Mr. Flagg said that Defendant supplied him with cocaine on approximately four occasions before his resignation, but Mr. Flagg did not pay Defendant for the drugs.

Sergeant James Clinard and Agent Steve Hamilton with the Clarksville Police Department, testified about a confrontation with Defendant each had experienced after Defendant's arrest on the current charges. Sergeant Clinard further testified that he believed that the grant of judicial diversion would adversely impact possible deterrence on others because of Defendant's position in the community and his familiarity with the court system. Special agent Rob Rowlett, with the T.B.I., participated in the investigation leading to Defendant's arrest. He stated that the use and sale of drugs in Montgomery County was a "huge problem," resulting in 834 arrests for narcotics violations in 2004.

Reverend Clarence Cheatham, pastor of the Woodlawn Elizabeth Missionary Baptist Church, and Reverend Jimmy Terry, pastor of the Tabernacle Missionary Baptist Church, testified on Defendant's behalf. Each described Defendant's involvement in church related activities. Reverend Cheatham described Defendant as a devoted father. Milam Lewis and Arthur Carter, friends of Defendant's family, described Defendant as hard working and a good father.

Defendant stated that he was fifty-five years old and had lived and worked in the area all of his life. Defendant said that he made good grades in school and attended college on a basketball scholarship. Defendant stated that he had always performed his work duties in a professional manner and was well known in the Montgomery County court system. Defendant said that there was nothing he would not do for the people of Montgomery County, and he asked the trial court for the opportunity to get his "life back on track with [his] family and the community."

III. Analysis

On appeal, Defendant contends that the trial court abused its discretion in refusing to grant judicial diversion. Defendant points to the State's willingness to enter into a negotiated plea agreement, and the failure of the State to provide a factual basis for the guilty pleas during the guilty plea submission. Defendant argues that the trial court placed undue emphasis on Ms. Davila's testimony. Defendant challenges as unreasonable the weight assigned by the trial court to those factors it found to be unfavorable to diversion. In its brief on appeal, the State argues that this Court is without jurisdiction to entertain Defendant's appeal. The State does not address the merits of the appeal.

A. Jurisdictional Issues

We will first address the State's jurisdictional challenge. The State argues that the length and manner of service of Defendant's sentence was established by the negotiated plea agreement. Accordingly, the State contends that Defendant's appeal following the entry of his guilty plea must fall within the parameters of Rule 37(b) of the Tennessee Rules of Criminal Procedure or fail. Rule 37(b) provides an appeal as of right following the entry of a plea of guilty or nolo contendere if the defendant properly reserves a certified question of law that is dispositive of the case. The State submits that Defendant did not properly reserve a certified question of law on the judgment of conviction, and, even had he done so, Defendant's challenge to the denial of judicial diversion is not dispositive of his case.

Rule 37(a) defines an appeal as a "[d]irect appellate review available as a matter or right." Rule 37(b), thus, must be read in tandem with Rule 3(b) of the Tennessee Rules of Appellate Procedure which provides that:

[i]n criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. *The defendant may also appeal as of right from an order denying or revoking probation*, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b)(emphasis added).

Thus, appeals as of right by a Defendant entering a plea of guilty are not limited to those addressing only a certified question of law. This Court has observed that:

[a]mong the alternative bases for an appeal as a matter of right, one basis – an order denying probation – makes a connection with judicial diversion. "Judicial diversion" is merely an appellation supplied by the courts, probably to distinguish it from section 40-15-105 pretrial diversion, and the phrase is not used in the governing statute. *State v. Stephen J. Udzinski and Donna Stokes*, No. 01C01-9610-CC-00431, 1998 WL 4922 (Tenn. Crim. App., at Nashville, Feb. 5, 1998) (minority opinion). In actuality, the statute is a "probation" statute. *Id.* It is captioned as such and is inserted in the Code "immediately after the provisions dealing with other forms of

probation.” *State v. Talmadge G. Wilbanks*, No. 02C01-9601-CR-0003, 1996 WL 668119 (Tenn. Crim. App., at Jackson, Nov. 19, 1996), *perm. to appeal denied* (Tenn. 1997). Section 40-35-313 prescribes probation during the deferral period.

State v. Norris, 47 S.W.3d 457, 462 (Tenn. Crim. App. 2000). It has long been held that “an appeal may be taken after entry of judgment when the trial court denies judicial diversion.” *State v. George*, 830 S.W.2d 79, 80 (Tenn. Crim. App. 1992).

One caveat enunciated by our Supreme Court relevant to an appeal from a denial of judicial diversion is that “the trial court may entertain the issue of judicial diversion only when the court rejects the [guilty plea] agreement or when such an option is reflected in the 11(e)(1)(C) plea agreement.” *State v. Soller*, 181 S.W.3d 645, 650 (Tenn. 2005). In the case *sub judice*, the negotiated plea agreement, with the consent of the State and the trial court, specifically provides that “[t]he parties agree that [the] question of sentence of probation pursuant to T.C.A. § 40-35-313 will be determined by the Court at a subsequent hearing. The court shall reserve acceptance of this plea agreement until the issue of judicial diversion is determined by the court.”

The State argues that the trial court’s reservation of acceptance of the plea agreement, by its terms, disqualifies Defendant as a candidate for judicial diversion, relying on the statutory definition of a “qualified defendant” as a defendant who “[i]s found guilty or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought.” T.C.A. § 40-35-313(a)(1)(B)(i). We respectfully disagree with the State’s somewhat circular interpretation of the definition. The statute specifically grants the trial court authority to “defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require *without entering a judgment of guilty* and with the consent of the qualified defendant.” *Id.* § 40-35-313(a)(1)(A). Indeed, the trial court’s acceptance of a defendant’s plea of guilty and the entry of a judgment precludes the trial court from imposing judicial diversion. *Soller*, 181 S.W.3d at 650. The inclusion of the option of judicial diversion in Defendant’s negotiated plea agreement and the trial court’s deferral of entering judgment until after an adjudication of Defendant’s suitability for judicial diversion mirrors the procedure favorably contemplated in *Soller*.

Finally, the State argues that notwithstanding the inclusion of the option of judicial diversion in Defendant’s negotiated plea agreement, the agreement provides that “the parties agree that there shall be a binding plea agreement of six (6) years of probation regardless of the court’s determination [as to] 40-35-313 post-trial diversion.” Although not entirely clear, it appears that the State submits that the terms of the negotiated plea agreement render a subsequent determination as to a grant of judicial diversion an act of futility. That is, Defendant agreed to a probationary term regardless of the outcome of his hearing on suitability for judicial diversion. Judicial diversion, however, is a probationary sentence. We do not interpret this sentence to preclude the trial court from granting a probationary sentence of six years under section 40-35-313. Accordingly, the State is not entitled to prevail in its argument that this Court lacks jurisdiction to hear this appeal.

B. Merits of the Appeal

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty or nolo contendere to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. *See* T. C. A. § 40-35-313(a)(1)(B). Defendant is statutorily eligible for judicial diversion; however, the fact that Defendant meets the prerequisites does not entitle him to judicial diversion. It is within the trial court's discretion to grant or deny judicial diversion. *See State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). As such, the trial court's decision will be overturned only if the court abused its discretion. *Id.* In other words, we will not interfere with the denial of judicial diversion if the record contains any substantial evidence to support the trial court's refusal to grant diversion. *Id.* Moreover, we observe that “judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under [Tennessee Code Annotated section] 40-15-105.” *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

In determining whether to grant a defendant judicial diversion, the trial court must consider all of the following factors: (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the status of the defendant's physical and mental health, and (6) the deterrence value to the defendant and others. *State v. Lewis*, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997). “The trial court should also consider whether judicial diversion will serve the ends of justice—the interests of the public as well as the accused.” *Id.* The record must reflect that the trial court has taken all of the factors into consideration. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). Furthermore, “[t]he court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others.” *Id.*

The trial court articulated both the specific reasons supporting its denial of judicial diversion and why those factors unfavorable to the grant of diversion outweighed the favorable factors. The trial court found that Defendant's behavior since his arrest, other than the two comments made to Sergeant Clinard and Agent Hamilton, was favorable, as were the attributes of character testified to by Reverend Cheatham, Mr. Lewis, and Reverend Terry. The trial court also favorably considered Defendant's general reputation in the community. The trial court noted that there was no evidence that Defendant was currently using drugs, and found that this factor weighed in favor of diversion. The trial court also found that Defendant “has met most of the monetary responsibilities of being a father,” and, although it attributed little weight to this factor, the trial court considered this aspect as favorable.

The trial court articulated those factors which it found carried no weight for or against diversion, including Defendant's social history and education, the deterrence value to Defendant and others, and Defendant's attitude during the hearing. The trial court acknowledged that Defendant had been steadily employed since graduating from college, but it observed that Defendant's

employment “placed him in daily contact with law enforcement, clerks of the courts and the courts.” The trial court found that “[p]ast employment is a favorable factor, but not one that the Court will give much weight.”

Those factors weighing against granting judicial diversion, but to which the trial court assigned little weight, included the circumstances of the offenses and Sergeant Clinard’s and Agent Rowlett’s testimony concerning the need for deterrence from a community viewpoint. Those unfavorable factors upon which the trial court placed the most emphasis were Defendant’s apparent lack of amenability to rehabilitation, his continuing pattern of criminal behavior evidenced by his supplying drugs to Ms. Davila and Mr. Flagg, and whether diversion would serve the ends of justice. Relevant to these factors, the trial court stated that:

the court has mentioned the lack of remorse and the difference in the sworn testimony during the plea colloquy and his statement in the presentence report. This indicates to the Court that the defendant is not amenable to correction. . . . The defendant has no prior criminal convictions; however, he does have criminal offenses in delivery of cocaine and marihuana on many occasions. . . . [T]he defendant was a bondsman when he committed these conspiracy acts. He made bonds for persons charged with crimes. He was seen in the jail making bonds daily. The defendant was present in courts every day criminal courts meet. The defendant possessed the knowledge that some people do get diversion, some get probation and some go to the penitentiary. Knowing this and seeing this daily, he chose to commit these crimes. Further he chose over 100 times to deliver or casually exchange cocaine and marihuana.

The trial court concluded that “[w]eighing all factors, the court finds (1) defendant’s lack of amenability to correction and factor (7) whether diversion is serving the interests of justice outweigh all favorable factors. The Court sees a man who for several years is providing drugs. To provide drugs he must have a means of acquiring those drugs on a weekly basis. He is in court daily seeing how the criminal justice system works. Justice demands that a conviction be entered.”

Defendant argues that the trial court erred in considering the circumstances of the offenses as an unfavorable factor because the State did not present a factual basis in support of Defendant’s pleas of guilty as required by Rule 11(f) of the Tennessee Rules of Criminal Procedure. We acknowledge that there is little information in the record concerning the circumstances of the offenses other than Agent Rowlett’s testimony that the drug charges resulted from a lengthy investigation, and Ms. Davila’s testimony concerning the events leading up to the assault plea. Nonetheless, the trial court placed little weight on this factor, noting that “the circumstances of the conspiracy are not unusual except the defendant is a bondsman.” Because Defendant pled guilty to two counts of conspiracy to possess cocaine, the trial court found that the circumstances of the offenses weighed against diversion “to a small extent.”

Defendant argues that the trial court erred in finding that Defendant exhibited a lack of remorse based on the conflict between his testimony at the guilty plea submission hearing and his statement in the presentence report. Defendant contends that his plea was not given in response to any facts, but only to a recitation of the charges. At the guilty plea submission hearing, the trial court asked Defendant as to whether or not he was guilty of each of the charged offense, and three times Defendant replied, “Yes, sir.” In his statement in the presentence report, Defendant said:

I know you hear this all the time, but I am not guilty of any of the charges. It was in my best interest to take the plea they gave me. I have never sold drugs, I never had to. I didn’t touch the victim in any sexual way, I raised her since she was four.”

Defendant’s failure to take responsibility for his actions reflects poorly on his rehabilitation potential. In *State v. Anderson*, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992), this Court stated:

[t]he record reflects that the trial court did not consider the defendant sincere in accepting responsibility for the offense and it was duly concerned with the defendant's attempt to divert the blame to another. These circumstances are relevant to assessing the degree of rehabilitation potential shown by the defendant. Since the trial court was in the best position to determine his attitude and demeanor, we are not in a position to view the defendant differently upon the record before us.

The trial court noted that it “listened carefully” to Defendant’s statement at the sentencing hearing. The trial court found that Defendant’s “words were well chosen and indicated his high level of education. His words did not express any remorse concerning the offenses in reference to the cocaine. The defendant did not deny the testimony of Monica Davila that he provided her with cocaine.” A defendant is not required to admit guilt as a prerequisite for favorable consideration as a candidate for judicial diversion. *State v. Lane*, 56 S.W.3d 20, 29 (Tenn. Crim. App. 2000). However, the trial court also considered Defendant’s lack of candor about the offenses as reflected in his testimony at the guilty plea submission hearing and statements to the trial court and in his presentence report. This Court has held that a trial court may consider a defendant’s failure to accept responsibility for an offense in determining the potential for rehabilitation. *See Anderson*, 857 S.W.2d at 574. Based on our review, we conclude that the trial court did not abuse its discretion in this regard.

Defendant argues that his employment as a bondsman was irrelevant to the trial court’s consideration of his request for judicial diversion. The trial court considered Defendant’s employment relevant in analyzing whether the grant of judicial diversion would serve the interests of the public as well as Defendant. The trial court found that Defendant’s daily presence in the courts, and his knowledge of criminal offenses and the consequences of committing such offenses weighed against the grant of diversion. “While a bail bondsman is not a ‘public official’ sworn to uphold the law like a police officer is, he is an important member of the ‘criminal justice system.’” *State v. Gene Watson*, No. 01-C01-9010-CC00248, 1991 WL 94543, at *2 (Tenn. Crim. App., at Nashville, June 6, 1991) (finding no abuse of discretion in the District Attorney General’s

consideration of the defendant's status as a bail bondsman in denying pre-trial diversion). Defendant's role as a participant in the criminal justice system and his choice to commit criminal offenses notwithstanding that role is an appropriate factor, among others, to consider.

The trial court also considered the length of time during which Defendant supplied drugs to Ms. Davila. Defendant argues that Ms. Davila's testimony was successfully impeached on cross-examination, and the trial court's reliance on her testimony was thus misplaced. The trial court found that "[t]he testimony that truly impressed the court was the testimony of Monica Davila that the defendant provided her marijuana and cocaine weekly." The trial court found that Defendant "did not attack this portion of [Ms. Davila's] testimony, but did impeach her testimony concerning" a child support proceeding that occurred after Defendant's guilty plea submission hearing. Moreover, Mr. Flagg also testified that Defendant supplied him with cocaine on at least four occasions. The trial court appropriately considered Ms. Davila's and Mr. Flagg's testimony in connection with Defendant's history of continuing criminal activity. The trial court was in the best position to assess Ms. Davila's credibility, and we find no abuse of discretion in this regard.

Defendant contends that the trial court impermissibly relied on Ms. Davila's testimony as the sole factor in denying his request for judicial diversion and erred in not stating how this factor outweighed those factors favoring diversion. Our supreme court has concluded that "the circumstances of the offense, and the need for deterrence may alone justify a denial of diversion, *but only if all of the relevant facts have been considered as well.*" *State v. Curry*, 988 S.W.2d 153, 158 (Tenn. 1999) (citing *State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993)) (emphasis in original). In *Curry*, a pre-trial diversion matter, the district attorney general's denial letter "concentrated solely upon the circumstances of the offense, and arguably, a veiled consideration of deterrence" with "no apparent consideration give to the defendant's lack of a criminal record, favorable social history, and obvious amenability to correction." *Curry*, 988 S.W.2d at 159.

In the instant case, however, the trial court specifically listed the factors under consideration and explained the weight accorded each factor. The trial court considered as favorable factors Defendant's behavior since his arrest, the lack of evidence that Defendant was currently using drugs, the stability in his home environment, the fulfillment of his family responsibilities, and his reputation in the community. Unfavorable factors included Defendant's continuing pattern of criminal behavior prior to the arrests, his choice to engage in this type of criminal behavior despite his role in and familiarity with the criminal justice system, the attitude of the investigating officers, and his lack of candor with the trial court. Defendant challenges the weight accorded some of the factors by the trial court, contending that the positive attributes should have held more weight in the trial court's decision. Based on our review of the record, however, we conclude that the trial court adequately explained why it declined to grant judicial diversion and why the factors relied upon outweighed all other factors. We discern no abuse of discretion in denying diversion, and the record contains sufficient substantial evidence to support the trial court's refusal to grant diversion. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgments of the trial court.

THOMAS T. WOODALL, JUDGE